UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:)	
CASE FARMS PROCESSING, INC.,) Case Nos.))	8-CA-39152 8-CA-39187 8-CA-39257
and	j	
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 880.)))	

REPLY BRIEF OF RESPONDENT CASE FARMS PROCESSING, INC. TO THE BOARD IN RESPONSE TO THE GENERAL COUNSEL'S ANSWERING BRIEF

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LAW AND ARGUMENT

I. THE ADMITTEDLY UNRELIABLE TESTIMONY OF YERIMA MEDERO LEDESMA MUST NOT BE ENTITLED TO DEFERENCE.

In its answering brief the General Counsel has objected to a de novo review of the credibility determinations of the Administrative Law Judge ("ALJ") pertaining to Yerima Medero Ledesma ("Medero Ledesma"). The General Counsel rests this assertion primarily on the basis that witness Abel Acen ("Acen") was also deemed unreliable by the ALJ in many respects. The General Counsel fails to recognize, however, that the reliability of one of Respondent's witnesses is not a issue in assessing the credibility of Medero Ledesma—the General Counsel's sole and primary witness for the majority of the §8(a)(1) violation allegations.

The characterization of Medero Ledesma as an unreliable witness was established by the ALJ in his own decision. (ALJ Decision, p. 4)("I find neither Ledesma nor Acen to be entirely credible as both had deficiencies of a witness. Ledesma had a tendency to exaggerate and was prone to generalize at times."). Despite this general conclusion, the ALJ credited her testimony in many respects, particularly where it was the only evidence available to sufficiently support an unfair labor practice finding. The General Counsel contends that the ALJ's selective credibility determinations are supported by the record evidence because the "ALJ found significant deficiencies in Acen's testimony." (GC Brief, p. 2). The determination of Acen's credibility, however, is immaterial in assessing and determining the credibility of Medero Ledesma. Merely because the ALJ did not believe Acen's testimony in certain respects does not mean that the credibility determinations of Medero Ledesma are supported by evidence in the record—two incredible witnesses does not equal one credible witness.

Accordingly, as explained in detail in Respondent's Exceptions Brief, the preponderance of the evidence suggests that the ALJs credibility determinations as to Medero Ledesma are

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¹ The ALJ also several specific examples of Medero Ledesma's unreliability and are cited extensively in Respondent's Exceptions Brief. See, Resp. Brief, pp. 36-37.

incorrect and a de novo review by the Board is appropriate and necessary to properly evaluate the merits of the allegations contained in Paragraphs 9(A), (B), (C), (D), (E), (G), (H) and (I) of the Complaint.

II. EVEN IF MEDERO LEDESMA'S CREDIBILITY IS NOT CHALLENGED THE RECORD EVIDENCE UNEQUIVOCALLY ESTABLISHES THAT THE PATH TO ACEN'S OFFICE REQUIRED MEDERO LEDESMA TO PASS THE LINE OF SIGHT OF THE HUMAN RESOURCES DEPARTMENT.

The layout of Case Farms facilities around Acen's office has created much confusion in this case. So much so that it caused the ALJ to improperly conclude that Medero Ledesma could have surreptitiously entered Acen's office two to three times a week in order to hold secretive meetings. The General Counsel insists that the mistaken conclusion of the ALJ is merited and asserts that record evidence supports the conclusion that Medero Ledesma could have entered the office of Acen unnoticed regardless of the path she took. A closer look revels that this assertion is simply incorrect.

A. <u>Acen's Office Can Only Be Accessed by Passing, in Plain Sight, in Front of the Human Resources Window.</u>

In order to enter Acen's office a person begins at the same point of origin: The hallway to the left of the Human Resources office, next to the large cafeteria. (G.C. Ex. 27). From there, a person can enter Acen's office through one of two doors: (1) the door that opens into the Human Resources office (which would require a person to traverse **through** the Human Resources office) or (2) the hallway (which would require a person to **walk past the window** in front of the Human Resources office where the Human Resources representatives work). There is no alternative path.

The General Counsel contends, albeit confusingly, that because Medero Ledesma never testified to the existence of a window she could have entered Acen's office unnoticed.² (G.C.

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² The confusion stems from the fact that the ALJ concluded that Medero Ledesma had secretly entered Acen's office by commencing her journey in the "supervisor's lunchroom." The ALJ never concluded that Medero Ledesma walked **past** the Human Resources department unnoticed. This impliedly suggests

Brief, pp. 3-4) But as G.C. Ex. 27 clearly demonstrates, if Medero Ledesma did not pass the window she would have walked through the Human Resources department. This would have made her even more noticeable to the representatives who testified they never saw Medero Ledesma and Acen meeting alone. Accordingly, the General Counsel's suggestion that Medero Ledesma could have entered Acen's office by walking past the Human Resources department unnoticed is baseless and is unsupported in the record.

B. The ALJ's Conclusion that Medero Ledesma Could Have Entered Acen's Office Unnoticed By Walking From the Supervisor's Lunchroom is Unsupported by Record Evidence.

The heart of the confusion on this matter arises from the mischaracterization of the "supervisor's lunchroom" as being one in the same with the "training room." These two rooms are distinctively different and there is no record evidence establishing that they are the same. This confusion reveals how the ALJ's misunderstanding of the layout of the building led to his improper conclusion that Medero Ledesma laid in wait in the room she customarily ate lunch and entered Acen's office from the hallway leading from the supervisor's lunchroom without being observed.

In her own testimony, Medero Ledesma stated that she always ate her lunch in the same place:

- Q: [Ms. Bordelois] What did you do during your lunch break?
- A: [Medero Ledesma] During lunch period, I always went to the supervisor's dining area.

[Tr. 396].

Based on this evidence, and his misunderstanding of the building layout, the ALJ concluded that Medero Ledesma could have waited in the "supervisor's lunchroom" and moved, unobserved,

that the ALJ agreed that she could not have walked past the Human Resources department without being observed.

down the connecting hallway into Acen's office. However, record evidence reveals that the "supervisor's lunchroom" was not located down this hallway.

The General Counsel points to the testimony of Stephanie Ajanel ("Ajanel"), Case Farms

Human Resources representative, as support of the ALJ's conclusion. Ajanel testified that past

Acen's office there are only three rooms:

- Q: [Mr. Wilson] Okay. So taking - using the frame of reference to your left and your right as you're looking at [Acen' office designated on G.C. Ex. 27], if you go left on the hallway, down the hallway, where do you end up?
- A: [Ms. Ajanel] If you left, there's glass doors and you go out into the lunchroom.
- Q: And if you go right, where do you end up?
- A: You go past Abel's office, the shipping office, the plant manager's office, and back into the training room.³

[Tr. 925-926].

As can be seen, none of the rooms identified by Ajanel are the "supervisor's lunchroom." This evidence clearly does not support the ALJ's conclusion. Rather, it bolsters the position of Respondent that the "supervisor's lunchroom" is **not** located down the hallway to the right of Acen's office. Thus, for the same reasons stated in Respondent's Exceptions Brief, the conclusion of the ALJ that Medero Ledesma could have accessed Acen's office through the "supervisor's lunchroom" is baseless. Accordingly, there is no record evidence to support the ALJ's conclusion that Acen could meet privately with Medero Ledesma at which he made the statements to her as alleged in paragraphs 9(A), (B), (C), (E), (G), (H) and (I) of the Complaint.

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³ In addition, G.C. Ex. 27 does not designate the location, let alone existence, of the "supervisor's lunchroom."

III. OMAR CARRION RIVERA WAS NOT ENGAGED IN PROTECTED CONCERTED ACTIVITY WHEN HE CONFRONTED SUPERVISOR ADOLFO PADILLA.

In its Reply Brief, General Counsel contends that Omar Carrion Rivera ("Carrion Rivera") was engaged in protected concerted activity when he defied Supervisor Adolfo Padilla's ("Padilla") instructions for Noe Lozada ("Lozada") to return to his permanent assignment on Line 2. However, the only conclusion the facts support is that Carrion Rivera confronted Padilla solely because of a personal gripe.

Carrion Rivera was a trainer on Line 5. Because Lines 1-4 ran at a faster speed and also ran the most profitable products (Tr. 792, 793), Case Farms must take trained employees from Line 5 to keep the four critical deboning lines fully-staffed with trained employees (Tr. 792-793). The staffing priority was a personal irritant to Carrion Rivera who was unhappy at having to train a disproportionate number of new hires on Line 5 (Tr. 193-194). This was a personal gripe which affected him alone. On September 8, 2010, when Lozada was told by Padilla that he had been permanently assigned to Line 2 the day before and that he was to return to Line 2, Carrion Rivera defied Padilla, telling him "You can't take this employee...because you supervisors come here, take employees and I – the only thing I have left are new employees" (Tr. 214). This was clearly a personal gripe of Carrion Rivera's. Lozada agreed that Carrion Rivera vocalized his personal gripe to Padilla (Tr. 340).

As evidenced by Carrion Rivera's own testimony, his confrontation with Padilla was purely to keep trained employees on his line so he could not have to train more new employees. The cases cited by General Counsel is its Answering Brief are distinguishable. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), recognized as concerted activity an individual employee's reasonable and honest invocation of a right provided for in his collective bargaining contract. Here, there was no collective bargaining agreement and no right which was being challenged. Carrion Rivera acknowledged that it was common for supervisors to transfer employees from Line 5 to keep Lines 1 through 4 in full production (Tr. 211). The case of

Worldmark by Wyndham, 356 NLRB No. 104 (2011) involved a newly-announced dress code rule affecting all of the male salesmen's colleagues. Again, in this case, the transfer of new hires from Line 5 and the consequent requirement to train newly-hired employees affected only Carrion Rivera.

A personal gripe does not qualify for NLRA protection. *Media General Operations, Inc.,* 346 NLRB 369 (2006); *Holling Press, Inc.*, 343 NLRB 301 (2004). The Sixth Circuit, likewise, has found that personal gripes are unprotected. *See, Manimark Corp. v. NLRB,* 7 F.3d 547 (Sixth Circuit 1993)(employee's objection to a change in his commission was expressly a purely personal complaint); *Media General Operations v. NLRB,* 394 F.3d 2007, 176 LRRM 2385 (4th Cir. 2005)(personal missions are not the sort of concerted activity which the statute protects).

Carrion Rivera's confrontation with Supervisor Padilla was purely personal – he did not want to have Lozada transferred and have to train a new employee. For the foregoing reasons, the ALJ erred in deciding that Carrion Rivera was engaged in Section 7 activity during his confrontation with Supervisor Padilla on September 8.

IV. THE ALJ ERRED IN CREDITING CARRION RIVERA AND YASHA RIVERA MELENDEZ TO THE EXTENT THAT THEIR TESTIMONY CONFLICTED WITH THAT OF PADILLA, COOPER AND AYALA REGARDING THE INCIDENT BETWEEN PADILLA AND CARRION RIVERA.

As stated in Respondent's Exceptions (pp. 10-13), the clear preponderance of all of the relevant evidence establishes that the ALJ erred in crediting Carrion Rivera and Yasha Rivera Melendez ("Melendez") to the extent that their testimony conflicted with that of Padilla, Bernard Cooper ("Cooper") and Ramon Ayala ("Ayala"). One reason for not crediting Carrion Rivera is that during the confrontation, he testified that Padilla and Carrion Rivera were two meters apart (Tr. 257). Padilla, Ayala and Cooper all testified the two were within touching distance. Staying two meters apart during a five minute conversation in which you are defying your supervisor's attempt to transfer an employee is not credible. General Counsel submits that there is nothing incredible about having a conversation with someone who is two meters away. However, such

an assertion is only possible if the testimony of Cooper, Padilla and Ayala stating that Padilla and Carrion Rivera were within touching distance is completely and unjustifiably disregarded (Padilla – Carrion Rivera was yelling and shaking his finger in my face (Tr. 614); Ayala – Carrion Rivera was pointing his fingers in Adolfo Padilla's face (Tr. 682-683); Cooper – the two were within touching distance (Tr. 726)).

Further supporting Carrion Rivera's lack of credibility was the testimony of Lozada, the employee told by Padilla to return to Line 2. Lozada testified that Carrion Rivera and Padilla were right behind him when the confrontation was going on (Tr. 318). In fact, Lozada testified that Padilla, Ayala, Cooper and Carrion Rivera were all behind him while the confrontation was taking place (Tr. 319). This testimony not only contradicts that of Carrion Rivera's two meters contention but accentuates the credibility of Cooper, Padilla and Ayala.

For the foregoing reasons and those stated at Pages 10-13 of Respondent's Exceptions, the ALJ erred in crediting Carrion Rivera and Melendez over that of Padilla, Cooper and Ayala regarding Carrion Rivera's confrontation of Padilla.

CONCLUSION

For all the forgoing reasons, and for all the reasons previously stated in its Exceptions Brief, Respondent respectfully requests that the Board reverse the ALJ's decision regarding the exceptions and dismiss the Complaint in its entirety, and find that Respondent did not violate the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on November 16, 2011, a copy of the foregoing *Reply Brief of Respondent Case Farms Processing, Inc to the Board in Response to the General Counsel's Answering Brief*, was filed with the NLRB's electronic filing system. Notice of filing will be sent to all Parties by operation of the NLRB's electronic filing system where the Parties then may access this filing.

Respectfully submitted,

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